Attachment B – Supplemental CSO Control Policy Comments

1. **The generic, boilerplate narrative water quality-based permit terms must be deleted, limited in scope, or properly applied to the facts of the SFPUC.**

The generic, boilerplate narrative water quality-based permit terms are contrary to law and are unsupported by the available facts. The permit terms at issue are:

- V (Receiving Water Limitations) on pages 7-8 of the Tentative Order, which states, in relevant part:

> Discharge shall not cause or contribute to a violation of any applicable water quality standard (with the exception set forth in State Water Board Order No. WQ 79-16) for receiving waters adopted by the Regional Water Board, State Water Resources Control Board (State Water Board), or U.S. EPA as required by the CWA and regulations adopted thereunder.

- G.I.I.1 on page G-2 in Attachment G (Regional Standard Provisions), which states:

> Neither the treatment nor the discharge of pollutants shall create pollution, contamination, or nuisance as defined by California Water Code section 13050.

G.I.I.1 is applied to the SFPUC through permit term VI.A.2 (Standard Provisions) on page 8 of the Tentative Order, which states "[t]he Discharger shall comply with all applicable provisions of the 'Regional Standard Provisions, and Monitoring and Reporting Requirements' (Attachment G). . . ." The term "pollution," as used in G.I.I.1, is defined under state law to mean, in relevant part, "an alteration of the quality of waters of the state . . . which unreasonably affects . . . the waters for *beneficial uses*." Cal. Water Code § 13050(l) (emphasis added).

As explained below, V and G.I.I.1 are contrary to law and unsupported by the available facts and must be deleted, limited in scope, or properly applied to the facts of the SFPUC with corresponding findings in the permit.

a. The permit terms at V and G.I.I.1 should be deleted from the permit because they are inconsistent with applicable law and introduce unnecessary uncertainty regarding ongoing compliance with the permit.

The permit terms at V and G.I.I.1 are generic, boilerplate permit terms and they are neither SFPUC- nor pollutant-specific. The purpose and intent of the permit terms is unclear and, as a practical matter, they create uncertainty for the SFPUC associated with its permit obligations and how the agency can ensure that it is maintaining compliance with those obligations. Additionally, the permit terms at V and G.I.I.1 are inconsistent with NPDES permitting regulations, which require that applicable water quality standards be translated into permit effluent limitations.

Water quality-based effluent limitations ("WQBELs") are set forth in the WQBEL section of the Tentative Order at IV on page 9.[1] WQBELs "are designed to protect water quality by ensuring that water quality standards are met in the receiving water." EPA NPDES Permit Writer's Manual (2010) at 6.0. The permit terms at V and G.I.I.1 are not derived from the applicable water quality standards to "control those parameters to the extent necessary to achieve water quality standards in the receiving water." EPA NPDES Permit Writer's Manual at 6.1.3. The permit terms create uncertainty, to-be-determined liability, and apply circular and undefined logic where the SFPUC "must comply with water quality standards" by "complying with water quality standards." A permit term that references, but does not translate, applicable water quality standards is inappropriately bypassing the NPDES permitting process. *See NRDC v. EPA*, 16 F.3d 1395 (4th Cir.1993) ("[w]ater quality standards are a critical component of the CWA regulatory scheme because such standards serve as *a guideline for setting applicable limitations in individual discharge permits.")* (emphasis added); *American Paper Inst. v. EPA,* 996 F.2d 346 (D.C. Cir. 1993) ("[W]ater quality standards by themselves have no effect on pollution; the rubber hits the road when the state-created standards are used as *the basis for specific effluent limitations in NPDES permits.")* (emphasis added). When developing permit requirements for combined sewer systems to meet applicable water quality standards, "the permit writer, in conjunction with staff involved in water quality standards and the permittee, should identify the appropriate *site-specific considerations* that will determine the [CSD] conditions to be established in the permit." EPA NPDES Permit Writer's Manual at 9.2.3 (emphasis added). Appropriately derived WQBELs for the SFPUC should involve a site-specific evaluation of the discharge and its effect on the receiving water (*e.g.*, VI.C.5.c in the Tentative Order for wet weather discharges).

The permit terms are contrary to the NPDES regulatory framework for establishing WQBELs. For example, there is a well-established "standards-to-permits" process used to assess the need for and develop WQBELs. *See* NPDES Permit Writer's Manual at 6.0. The Regional Board and EPA did not follow this process in promulgating V and G.I.I.1. Further, if the Regional Board and EPA believe a discharge(s) of a pollutant(s) is inconsistent with applicable water quality standards, the appropriate next step is for the Agencies to develop and/or revise the applicable WQBEL(s) for that pollutant. *See* 40 C.F.R. § 122.44(d)(1)(i) and EPA NPDES Permit Writer's Manual at 6.4. Simply incorporating by reference applicable water quality standards via the permit terms at V and G.I.I.1 is especially inappropriate when the collection system is a combined sewer system and the State has declined to develop wet-weather-specific uses or objectives in the applicable water quality standards. *See e.g.,* State Water Board Order No. WQ 79-16 at 8-9 (Appendix).

As a practical matter, the permit terms at V and G.I.I.1 improperly and unnecessarily resurrect "causation" as a fundamental element of the NPDES permitting framework. This is regression to the pre-1972 CWA framework, before Congress "shifted the focus away from

[1] The Tentative Order places permit term V in a section called "Receiving Water Limitations." It is not clear to the SFPUC the distinction between a WQBEL and a "Receiving Water Limitation," if any, and the corresponding legal implications from the distinction. If there is a substantive distinction(s), the SFPUC requests the Regional Board and EPA provide an explanation of the difference(s).

water quality standards to direct limitations on the discharge of pollutants." *Friends of the Earth v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 151 (4th Cir. 2000). This shift in the CWA's focus was purposeful so "[r]egulators no longer had to determine whether there was a causal link between the degradation of water quality and the pollutant in question." *Piney Run Preservation Ass'n v. County Com'rs of Carroll Cty*, 268 F.3d 255, 265 (4th Cir. 2001). Instead, regulators and permittees, like the SFPUC, "simply had to determine whether the entity was discharging more pollutant[s] into water than allowed" based on facility- and pollutant-specific technology-based and water quality-based effluent limitations identified by the permitting authority in the permit. *Id.* at 265-266. The permits terms at V and G.I.I.1 create uncertainty for the SFPUC and consistent with the NPDES permitting regulations the permit should create clear expectations in the permit. The SFPUC should know when the permit is issued whether it is in compliance with the terms of the permit.

Lastly, these permit terms are not necessary. There are already appropriate SFPUC-specific WQBELs in the Tentative Order. *See* VI.C.5.c and Section 1.b of these comments in Attachment B. The Tentative Order includes an explicit "reopener" provision that allows the Regional Board and EPA to modify or reopen the permit before expiration if, in relevant part, a "present or future investigations demonstrate that the discharges governed by this Order have or will have a reasonable potential to cause or contribute to . . . adverse impacts on water quality or beneficial uses of the receiving waters." *See* Tentative Order at VI.C.1.a.

The permit terms create uncertainty, to-be-determined liability, and apply circular and undefined logic. The permit terms do not address an existing impairment, they do not require any action by the SFPUC, but they do create uncertainty and potential liability, and the permit includes a mechanism to address any future concern with a discharge impairing receiving waters. As noted above, a permit term that references, but does not translate, applicable water quality standards is inappropriately bypassing the NPDES permitting process. The permits terms at V and G.I.I.1 should be deleted.

b. <u>If the permit terms at V and G.I.I.1 are not deleted from the permit, they must be properly limited in scope to dry weather discharges</u>.

If the Regional Board and EPA retain the permit terms at V and G.I.I.1 their application must be limited to dry weather discharges. Put another way, V and G.I.I.1 should not apply to wet weather discharges—notably combined sewer discharges ("CSDs")—because as explained below there are already wet weather-specific WQBELs in the permit. To be clear, the SFPUC believes the most appropriate course of action is deleting permit terms V and G.I.I.1 as requested in Section 1.a of these comments in Attachment B. However, if not deleted, we believe the next best course of action is adopting the clarifications proposed in this section of the comments. For readability, in the attached redline of the Tentative Order, the SFPUC did not delete V and G.I.I.1, but inserted revisions that align with the requests in this section of the comments. *See* Attachment A.

The Tentative Order does include a provision in the WQBEL section of the permit (IV.B) that appears to align with the SFPUC's request in this section of the comments:

> During wet weather, the Discharger shall comply with the narrative water quality-based effluent limitations contained in Provision VI.C.5.c (Long-Term Control Plan).

However, there is still uncertainty associated with the intent and meaning of this permit term. The SFPUC requests the Regional Board and EPA confirm that the intent and meaning of the permit term at IV.B is that during wet weather the applicable WQBELs for the SFPUC, including for CSDs, are the LTCP provisions at VI.C.5.c. This interpretation of IV.B would align with the existing Oceanside NPDES permit and the CSO Control Policy. *See, e.g.*, Oceanside NPDES Permit, Fact Sheet at F-13 (Appendix) ("[t]he purpose of this long-term control plan is to comply with the CWA water quality requirements"); CSO Control Policy, 59 Fed. Reg. 18,688 (April 19, 1994) (The focus of the LTCP provisions are "attaining compliance with the CWA, including compliance with water quality standards and protection of designated uses.").

Assuming this is the Regional Board's and EPA's intent with IV.B, the SFPUC requests a few clarifying edits to the Tentative Order to avoid any future uncertainty with the meaning of the permit. First, the SFPUC requests the following text be added to IV.B to make it clear that the provision in IV.B applies to all of the discharge points in Table 2 of the Tentative Order, including CSD-001 through CSD-007.

> During wet weather, the Discharger shall comply with the narrative water quality-based effluent limitations contained in Provision VI.C.5.c (Long-Term Control Plan) <u>for the Discharge Points in Table 2</u>.

The SFPUC requests a corresponding revision be made in the Fact Sheet at page F-18 of the Tentative Order:

> During wet weather, this Order imposes narrative effluent limitations <u>at VI.C.5.c</u>, not numeric limitations, <u>on the Discharge Points identified in Table 2 of this Order</u>. In accordance with the *Combined Sewer Overflow (CSO) Control Policy*, this Order requires the Discharger to implement and update its Long-Term Control Plan.

The SFPUC also requests the Fact Sheet make clear that the WQBELs in VI.C.5.c are *<u>the</u>* WQBELs that apply during wet weather. Further, the SFPUC requests the permit make clear that compliance with the LTCP permit terms at VI.C.5.c – the applicable WQBELs – will result in attainment of applicable water quality standards. As EPA has made clear, WQBELs are by definition the effluent limitations in NPDES permits necessary for compliance with water quality standards. *See, e.g., In re City of Moscow, Idaho*, 10 E.A.D. 135 (EAB 2001) ("Water quality-based effluent limits . . . are designed to ensure that the applicable state water quality standards are met."). The SFPUC requests the Regional Board and EPA confirm that compliance with WQBELs results in compliance with the applicable water quality standards, including protecting beneficial uses. Lastly, since the LTCP permit terms at VI.C.5.c are the WQBELs for wet weather discharges, the permit terms at V and G.I.I.1 are unnecessary, redundant and the permit should make clear that V and G.I.I.1 do not apply to wet weather discharges, including CSDs. The Regional Board has taken consistent positions in the Oceanside NPDES permit, explaining that generic, boilerplate permit terms like V and G.I.I.1 are only applicable for problems that may arise that are not regulated by other *<u>more specific provisions contained in a permit</u>.*" 2003

OSP NPDES Permit, Response to Comment 25. (emphasis added). The SFPUC requests that the points raised in this paragraph be reflected in the Fact Sheet at F-25 of the Tentative Order via the following revisions:

> **Wet Weather.** For wet weather discharges from Discharge Point No. 001 and CSD-001 through CSD-007 identified in Table 2 of this Order ~~the combined sewer discharge points~~, the Long-Term Control Plan required pursuant to the *Combined Sewer Overflow (CSO) Control Policy* and described in Provision VI.C.5.c of the Order serves as the ~~narrative~~ WQBELs in this Order that are necessary to achieve applicable water quality standards, including to protect existing and designated uses. For wet weather discharges from the Discharge Points in Table 2 of this Order, the terms at VI.C.5.c are the applicable WQBELs and the terms at V and G.I.I.1 are not applicable.
>
> c. The Regional Board and EPA must include a finding in the permit that the CSDs are in compliance with those permit terms because it cannot issue a permit for activities that are inconsistent with the Clean Water Act and because a failure to include a finding is a substantial deviation from previous permits.

If the Regional Board and EPA retain the permit terms at V and G.I.I.1 and reject the requested clarifications to the permit in Section 1.b of these comments in Attachment B, the permit must include a finding that CSDs from CSD-001 through CSD-007 are in compliance with those permit terms. The substantive requirement in both V and G.I.I.1 is that discharges not impair the uses in the applicable water quality standards. Therefore, the permit must make a finding that the frequency and volume of CSDs, especially in the context of bacteria, are in compliance with those permit terms because the current frequency and volume of the CSDs do not impair uses.

As a matter of law, the Regional Board and EPA cannot reissue the permit, as currently written, if CSDs are impairing uses and, correspondingly, the SFPUC is not currently in compliance with the permit terms at V and G.I.I.1. *See, e.g.*, CWA Section 301(b)(1)(C). Any legal risk to the Regional Board and EPA is not applicable in this case because the SFPUC's discharges are in compliance with the permit based on the fact the CSDs are not impairing the uses in the applicable water quality standards. However, the permit must include this finding in the permit and, as detailed below, this finding that CSDs do not impair uses is consistent with the design of collection system, prior findings by the Regional Board and EPA and all available current information.

As a matter of fact, the SFPUC's collection system was designed to protect beneficial uses. State Water Board Order No. WQ 79-16 at 10-13. The collection system was designed for a long-term average of eight (8) CSDs, per year, from CSD-001 through CSD-007. *Id* at 6, 16. The Regional Board and EPA made a finding that eight (8) CSDs would protect beneficial uses. *Id* at 10-13. The design of the collection system on the Westside was not based on blind faith, but on modeling, monitoring, use assessments, cost and benefits comparisons and additional data and analyses and Regional Board and EPA findings made over the course of decades, including in the existing Oceanside NPDES permit. *Id.* at 1-6; *see also* San Francisco Bay Regional Water Quality Control Board, Order No. 79-12 (Jan. 16, 1979) (Appendix); Westside Wet Weather

Facilities Revised Overflow Control Study, Abstract Report and Request for Revised Overflow Frequency (December 15, 1978) (Appendix)

Based on the design of the collection system, the Regional Board and EPA have consistently concluded that the frequency and volume of CSDs are consistent with beneficial uses. *See, e.g.,* 1997 OSP NPDES Permit, pg. 10, finding 15 (The Regional Board "found that a long term average of [8] overflows per year would provide adequate overall protection of beneficial uses.") (Appendix) In fact, every Oceanside NPDES permit since the SFPUC completed the Westside collection system in 1997 has made it clear that the existing controls on CSDs protect beneficial uses, including recreation. *See, e.g.*, 2009 OSP NPDES Permit, Fact Sheet at F-34 (The collection system "would not compromise beneficial uses.") (Appendix); 2003 OSP NPDES Permit, pg. 10, findings 15, 30 (The LTCP "would provide adequate overall protection of beneficial uses;" "the exception [based on State Water Board Order No. WQ 79-16] will not compromise protection of ocean waters for beneficial uses") (Appendix); 1997 OSP NPDES Permit, pg. 8, finding 15(c) ("San Francisco has demonstrated compliance . . . during wet weather with water quality standards"). The SFPUC's collect system is performing as designed. In fact, it's performing better: the actual frequency of discharges from CSD-001 through CSD-007 has been and continues to be below the frequency that was determined to provide protection to beneficial uses. *See* Tentative Order, Table F-3, Fact Sheet F-9 and the discussion further below in this section, 1.c, of these comments in Attachment B.

As a result of a CSD, there may be a temporary increase in the level of bacteria in the receiving water. However, this fact does not mean beneficial uses are not protected. The fact that there may be a temporary increase in the level of bacteria was known to the Regional Board and EPA when the collection system was designed and when the Regional Board and EPA found the existing level of control of CSDs protects beneficial uses. For example, in 1994, the EPA directed studies of the collection system to determine if the performance would be consistent with the CSO Control Policy given the fact that the SFPUC was nearing completion of its implementation of its pre-CSO Control Policy LTCP and the construction of the Westside collection system. *See* The Cadmus Group, (Aug. 26, 1994) ("Cadmus Report") (Appendix). EPA concluded that frequency and volumes of CSDs result in "temporary elevation in bacteria levels immediately following an overflow event." Cadmus Report at 2-9. Nonetheless, EPA found "[t]he [SFPUC] has constructed a wastewater treatment system that protects both water quality and the beneficial uses of these receiving waters." Cadmus Report at 4-12. EPA explained that the bacteria levels "return to background levels within one to two tidal cycles" or less. Cadmus Report at 2-8. The Regional Board and EPA incorporated this understanding of the nature of CSDs and their relationship to beneficial uses—in the context of the Oceanside NPDES permit—when finding CSDs protect beneficial uses. *See, e.g.,* 1997 OSP NPDES Permit, pg. 6, finding 10 ("elevated bacteria levels . . . tend to decrease rapidly, typically within 15 to 40 hours").

The factual findings and legal conclusions in the prior Oceanside NPDES permits and other documents are consistent with more recent findings by the Regional Board and EPA. For example, under CWA § 303(d), the State of California is required to develop a list of receiving waters that are "impaired" (*i.e.*, those receiving waters that do not meet applicable water quality standards, including beneficial uses) and submit the list for EPA's review and approval. In order

to establish and revise the CWA § 303(d) list of impaired receiving waters, the Regional Board is required to "assemble and evaluate all existing and readily available water quality-related data and information" 40 C.F.R. § 130.7(b)(5). The Regional Board and EPA have performed this assessment for the waters that receive discharges from CSD-001 through CSD-007 and concluded that the receiving waters are not impaired for bacteria.

The Regional Board and EPA found the receiving waters associated with CSD-001 through CSD-003 – the Pacific Ocean offshore Fort Funston and Ocean Beach – are not impaired for bacteria. *See* Clean Water Act Sections 303(d) and 305(b) 2016 Integrated Report for the San Francisco Bay Region, Decision ID Nos. 66036 (Pacific Ocean at Fort Funston), 65990 (Pacific Ocean at Ocean Beach) (Appendix). The CWA § 303(d) assessment for these receiving waters specifically examined bacteria data associated with CSDs and recreational uses. The data was collected during or just after storm events when CSDs were known to occur. Based on the available water quality-related data and information, including thirty lines of evidence for Ocean Breach and six lines of evidence for Fort Funston, the Regional Board determined that the receiving waters associated with CSD-001 through CSD-003 are not impaired by bacteria and beneficial uses are protected, including recreational uses.

While historically the receiving waters associated with CSD-005 through CSD-007 showed signs of impairment based on bacteria, on April 2017 the Regional Board finalized an action pursuant to CWA § 303(d) to de-list the receiving waters associated with Baker Beach regarding bacteria-caused impairment. *See* Clean Water Act Sections 303(d) and 305(b) 2016 Integrated Report for the San Francisco Bay Region Staff Report at Table 4, Decision ID No. 34385. (Appendix). The de-listing decision was based on sixteen lines of evidence and the Regional Board found that the receiving waters should be de-listed because "applicable water quality standards for [bacteria] *are not being exceeded.*" (emphasis added). On April 6, 2018, EPA approved the Regional Board's delisting of the receiving waters, concluding the de-listing was "due to *improved water quality.*" Letter from T. Torres, California 2014-2016 CWA Section 303(d) List of Impaired Waters at Enclosure 1 (April 6, 2018) (emphasis added) (Appendix) The Regional Board and EPA have concluded in just the last year, via this de-listing action, that the beneficial uses in the receiving waters are not impaired by bacteria.

The SFPUC requests the Regional Board and EPA confirm that the receiving waters associated with CSD-001 through CSD-007 are not impaired based on bacteria. Relatedly, the SFPUC requests the permit reflect the status of the receiving waters associated with CSD-001 through CSD-007 by including the following text in the section "Impaired Waters on CWA 303(d) List" in the Fact Sheet at F-14 of the Tentative Order:

> On April 6, 2018, U.S. EPA approved a revised list of California's impaired waters pursuant to CWA section 303(d), which requires identification of specific waters where it is expected that water quality standards will not be met after implementation of technology-based effluent limitations on point sources. Where it has not done so already, the Regional Water Board plans to adopt total maximum daily loads (TMDLs) for waters on the 303(d) list. TMDLs establish wasteload allocations for point sources and load allocations for nonpoint sources, and are established to achieve the water quality standards for the impaired waters. This Order does not authorize any discharge to

> receiving waters on California's list of impaired waters. The Pacific Ocean at Fort Funston, Ocean Beach, Mile Rock and China Beach are not impaired for indicator bacteria. The Pacific Ocean at Baker Beach is no longer listed as impaired for indicator bacteria because the sixteen available lines of evidence show applicable water quality standards are not being exceeded.

The SFPUC requests the Regional Board and EPA confirm that the findings requested by the SFPUC to include in the Fact Sheet are factually correct. If yes, the requested findings are accurate, but the requested findings are rejected from inclusion in the Fact Sheet at F-14, the SFPUC asks the Regional Board and EPA to provide an explanation why factually accurate and relevant findings are rejected from the permit.

Other consistent findings by the Regional Board and EPA include those in the Basin Plan, which contains the applicable water quality standards for CSD-005 through CSD-007, and where the Regional Board found that "[w]et weather discharges [(i.e., CSDs)] from the City of San Francisco's combined sewer system . . . are not considered a significant source of bacteria. . . ." Basin Plan at 7.2.5.2. Further, the finding that CSDs do not impair beneficial uses is consistent with the conclusions by the Regional Board and EPA in the Total Maximum Daily Load and Implementation Plan for Bacteria at San Francisco Bay Beaches ("Bacteria TMDL"), which was adopted by the State Board on Aug. 30, 2016 and approved by EPA on Feb. 24, 2017. (Appendix). In the Staff Report to the Bacteria TMDL, the Regional Board found that CSDs "are not a significant source of [bacteria]" *See, e.g.*, Bacteria TMDL, Staff Report at pgs. 20, 24, 27, 47, and 49. (Appendix). The Staff Report identifies various other sources of bacteria, (*e.g.*, urban runoff, pets at the beaches, vessels, and wildlife, etc.), and the factors that drive bacteria build up and transport, such as temperature, moisture conditions, pH, exposure to sunlight, and nutrient availability. *Id.* at pg. 40. The Regional and State Board findings in the Bacteria TMDL were approved by EPA and in the Feb. 24, 2017 approval letter EPA Region 9 stated that the implementation of this TMDL—which does not include any additional controls on CSDs—will "*result in the attainment of the bacteria water quality objectives.*" Letter from T. Torres to B. Wolfe, Approval of San Francisco Bay Beaches TMDL (Feb. 6, 2017) (emphasis added) (Appendix).

For decades, via multiple and varying administrative actions, the Regional Board and EPA have made conclusions based on the available information that the current frequency and volume of CSDs from CSD-001 through CSD-007 do not impair beneficial uses. Those findings were based, in part, on the design and performance of the collection system, the nature of the CSDs, and the uses. The collection system protects beneficial uses and if the Regional Board and EPA were to reach a contrary conclusion they would need to explain how such a finding can be explained in light of decades of fact-based conclusions and what new information supports a contrary finding(s).

The available information on the current performance of the collection system confirms the prior findings of the Regional Board and EPA that the frequency and volume of CSDs from CSD-001 through CSD-007 protects beneficial uses. *See, e.g.*, Technical Memorandum from the Program Management Consultant ("PMC"), Current Performance of the Westside Collection System During Wet Weather (Appendix). State Water Board Order No. WQ 79-16, which

established the long-term average of 8 CSDs per typical year, found that 8 CSDs per typical year from the hydrologic segments of the Westside collection system would protect beneficial uses. State Water Board Order No. WQ 79-16 at 10-13. In making that finding, the Regional Water Board and State Water Board found that the average number of days that the receiving waters adjacent to the CSDs would exceed levels of bacteria for body contact recreation would be 25 days per typical year. *Id.* at 6. As explained in the PMC Technical Memorandum, based on current performance, the frequency of CSDs in each hydrologic segment of the Westside collection system will be within 8 per typical year with approximately 2 days per typical year in which the enterococcus bacteria concentrations in Westside receiving waters may be above 104 MPN/100mL. If the Regional Water Board and State Water Board found in State Water Board Order No. WQ 79-16 that 8 CSDs and 25 days in elevated bacteria concentrations protects beneficial uses, including recreational uses, it is reasonable for the SFPUC to conclude that 9 CSDs and 2 days in elevated bacteria concentrations protects beneficial uses, including recreational uses.

2. The "LTCP Update" (VI.C.5.d) is Contrary to Law and Unsupported by the Available Facts and Prior Agency Findings.

As explained in Section 1.b of these comments in Attachment B, the LTCP-permit terms at VI.C.5.c are the SFPUC-specific WQBELs for wet weather discharges. However, the Tentative Order also includes new permit terms at VI.C.5.d that is identified as an "LTCP Update" that mandate the SFPUC "update its LTCP" by implementing a long list of tasks in Table 7 of the Tentative Order on pages 19-21. The "LTCP Update" permit terms are contrary to law and unsupported by the available facts and prior agency findings. A critical issue is that the permit terms are not aligned with the legal requirements in the CSO Control Policy. The SFPUC has provided redline edits to VI.C.5.d and Table 7. *See* Attachment A. An overarching theme of the requested revisions is to ground the tasks in Table 7 to the objective to assess and update the LTCP to be consistent with the applicable provisions of the CSO Control Policy. As a practical matter, the intent and meaning of the permit terms in Table 7 are unclear – the SFPUC cannot assess and select alternative controls to protect beneficial uses if it no longer knows what it means to protect beneficial uses.

As a threshold matter, the SFPUC requests the Regional Board and EPA identify the federal and state statutory and regulatory legal authority for each task and sub-task in Table 7. The Tentative Order on page 19 states that the tasks are ". . . based on the nine elements described in the Combined Sewer Overflow (CSO) Control Policy. . . ." and the Fact Sheet of the Tentative Order at F-31 cites various authorities that the Regional Board and EPA state support the permit terms. However, it is not clear what element(s) is being cited and it is not clear what specific element or authority the Regional Board and EPA is relying on for the position they have the legal authority for each task and sub-task in Table 7. The SFPUC requests the Regional Board and EPA identify the specific legal authority that authorizes each task and sub-task in Table 7.

SFPUC began the design of its collection system in the 1970s and completed construction in 1997. The CSO Control Policy and II.C.1 were published in 1994. The CSO Control Policy at I.C includes provisions to account for collection systems, like the SFPUC, that were close to

completing the construction of their collection system. In fact, I.C was included in the CSO Control Policy *because of* the SFPUC. The practical implication of I.C. is that the SFPUC was not—and is not—required by the CSO Control Policy to perform all of the tasks identified in II.C.1. Therefore, there is no legal authority to mandate the tasks in Table 7 of the Tentative Order. The Regional Board and EPA agree with this position in prior findings in the Oceanside NPDES permit. *See, e.g.,* 1997 OSP, pg. 6, finding 11 ("the City's program qualifies for the CSO Control Policy's classification under Section I.C. as being substantially complete *and exempt from the planning and construction requirements*.") (emphasis added). If the Regional Board and EPA disagree with this position, the SFPUC requests an explanation why, including their position on the practical implication of I.C as applied to the SFPUC. Relatedly, the SFPUC requests the Regional Board and EPA explain the demands in Table 7 in light of I.C and their prior findings that the SFPUC is exempt from most of the planning and construction requirements in the CSO Control Policy associated with the LTCP.

The SFPUC acknowledges there are ongoing and applicable requirement under the CSO Control Policy to review its LTCP and associated control measures, e.g., consistency with the sensitive area provisions. *See* CSO Control Policy I.C.2. As explained in more detail below, the SFPUC can accept appropriate permit terms that focus on ongoing obligations accompanied with clear objectives tied to the applicable statutory and regulatory framework. *See* Attachment A.

The legal framework for the SFPUC that should be reflected in the permit is the assessment of CSDs into sensitive areas and the identification of any revisions to its LTCP, as necessary, based on the step-by-step legal framework at II.2.C.3 of the CSO Control Policy. Such an assessment would necessarily take into consideration appropriate financial capability analyses and data from the SFPUC's post-construction monitoring program. This legal framework has been included in prior Oceanside NPDES permits, including the existing permit. *See* Oceanside NPDES Permit at VI.C.7. The SFPUC has performed assessments pursuant to those permit terms and submitted analyses to the Regional Board and EPA. Westside Sensitive Areas Report (2011) (Appendix). The SFPUC requests the Regional Board and EPA confirm that for a combined sewer system like the SFPUC the applicable legal framework to assess whether any modification(s) are necessary to the LTCP is a sensitive areas analysis consistent with II.2.C.3. If the Regional Board and EPA disagree, the SFPUC requests they identify the alternative legal framework and cite the associated statutory and regulatory authority that mandates that alternative legal framework.

The first step in a sensitive area analysis is to determine, in relevant part, whether it is "physically possible and economically achievable" to "eliminate or relocate overflows that discharge to sensitive areas . . . except where elimination or relocation would provide less environmental protection than additional treatment." CSO Control Policy at II.2.C.3.b.i. The SFPUC does not object, in concept, to permit terms that require this assessment. Again, such permit terms would be similar to requirements in prior Oceanside NPDES permits. However, as currently drafted, the permit terms at VI.C.5.d assume there *will be* alternative control measures proposed by the SFPUC to eliminate or relocate CSDs because of the analyses required by Table 7. This assumption must be removed from Table 7. *See* Attachment A. It is inappropriate for the permit terms to presuppose the outcome of to-be-performed analyses. Further, it is SFPUC understanding that the Regional Board and EPA define "elimination" of CSDs to mean the

separation of the combined sewer system into distinct sanitary and storm sewer systems. The SFPUC requests the Regional Board and EPA confirm this understanding or explain their interpretation of "elimination." Given the likely financial impacts associated with "elimination," and resulting reduced environmental protection due to a resulting increase in the discharge of untreated stormwater, an assumption in the permit that there will be SFPUC proposed alternative controls for "elimination" of CSDs is inappropriate and contrary to law and available facts.

Further, the SFPUC understands "relocated" to mean CSDs would discharge in a receiving water that is not a "sensitive area." The Regional Board and EPA have not identified in the Tentative Order what receiving waters are sensitive areas. The SFPUC requests that the Regional Board and EPA identify what it believes are sensitive areas and the factual basis for that determination. Further, if the Regional Board and EPA identify all receiving waters as sensitive areas, the SFPUC requests an explanation how it is supposed to "relocate" CSDs from sensitive areas.

The second step in a sensitive areas analysis is, if elimination or relocation is not physically possible and economically achievable, "provide the level of treatment for remaining overflows deemed necessary to meet WQS for full protection of existing and designated uses." CSO Control Policy at II.2.C.3.b.ii. The permit terms in Table 7 are divorced from the substantive framework at II.2.C.3.b.ii. In Table 7, beyond the inclusion of "elimination" and "relocation," the Tentative Order includes permit terms that mandate analyses to "*reduce* the magnitude or frequency of discharges" and requires associated assessments and selection of control alternatives to "reduce" CSDs. *See, e.g.*, Tentative Order at Table 7, Task 3.e (emphasis added). The legal framework requires controls necessary to protect uses in applicable water quality standards, but the existing permit terms in Table 7 associated with "reduction" mandate reduction for the sake of reduction, not tied to what is necessary to protect beneficial uses. There is no statutory or regulatory legal basis to mandate the SFPUC "reduce" CSDs, especially "reduction" simply for the sake of reduction. The SFPUC asks the Regional Board and EPA to identify the legal authority that allows them to require in the permit that the SFPUC assess and select control alternatives for "reducing" CSDs. The permit terms in Table 7 must be revised to align with the statutory and regulatory framework. *See* Attachment A.

Critically, even if revisions made in Table 7 explicitly link any "reduction" in CSDs to what is necessary to protect uses, as explained in Section 1.c of these comments in Attachment B, the existing control measures associated with the frequency and volume of CSDs from CSD-001 through CSD-007 *already* protect uses. Table 7 makes an assumption, similar to the one noted above for "elimination" and "relocation" that there *will be* SFPUC proposed alternative controls for the "reduction" of CSDs. This assumption is inappropriate and contrary to law and the available facts. The SFPUC can agree to a framework, in collaboration with the Regional Board and EPA, to assess the relationship between CSDs and receiving water quality in alignment with the statutory and regulatory authorities, including the CSO Control Policy. *See* Attachment A. The deliverables from the tasks in Table 7 can then be used to inform future permitting decisions, including the appropriate WQBELs for wet weather discharges in VI.C.5.c.

Lastly, even if the permit terms in Table 7 were consistent with the legal framework and/or had a factual basis, they are vague and fail to provide fair notice to the SFPUC on what is

required by the terms of the permit. For example, as explained in Section 1.c of these comments in Attachment B, the Regional Board and EPA have for decades taken the position that the current frequency and volume of CSDs protects beneficial uses. If that consistent finding is no longer true, the SFPUC no longer knows what level of control would provide "full protection of . . . uses." CSO Control Policy at II.C.3.b.ii. The SFPUC cannot assess alternative controls to protect uses when it no longer knows what it means to protect uses. The SFPUC requests the Regional Board and EPA confirm that State Water Board Order No. WQ 79-16 establishes the meaning of protecting beneficial uses. Absent re-defining through appropriate administrative action what it means to protect uses—for the SFPUC, for CSDs, for bacteria—the SFPUC will not know what "reduction" alternative would "protect" uses as currently outlined in Table 7.